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**No. 89-605**

**Supreme Court, U.S.**

**FILED**

**NOV 15 1989**

**JOSEPH F. SPANIOLO, JR.**

**CLERK**

**IN THE  
Supreme Court of the United States  
OCTOBER TERM 1989**

**LAWRENCE M. ROBERTSON, JR., M.D.,**  
*Petitioner,*

**v.**

**STATE BOARD OF MEDICAL EXAMINERS, an agency of the  
State of Colorado; GENE E. BOLLES, M.D.; HENRY G. FIEGER,  
M.D.; NANCY GERLOCK; JACK KLAPPER, M.D.; STEPHEN R.  
KOSLOFF, M.D.; ROBERT LEDERER, M.D.; NELSON E. MOH-  
LER, D.O.; FREDERICK R. PAQUETTE, M.D.; CHRISTINE A.  
PETERSEN, M.D.; RAY E. PIPER, D.O.; MOLLY SOMMERVILLE,  
ESQ.; BRUCE WILSON, M.D.; MICHAEL VITEK, each as indi-  
viduals of that agency,**

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT  
OPPOSITION BY RESPONDENTS TO PETITION  
FOR WRIT OF CERTIORARI**

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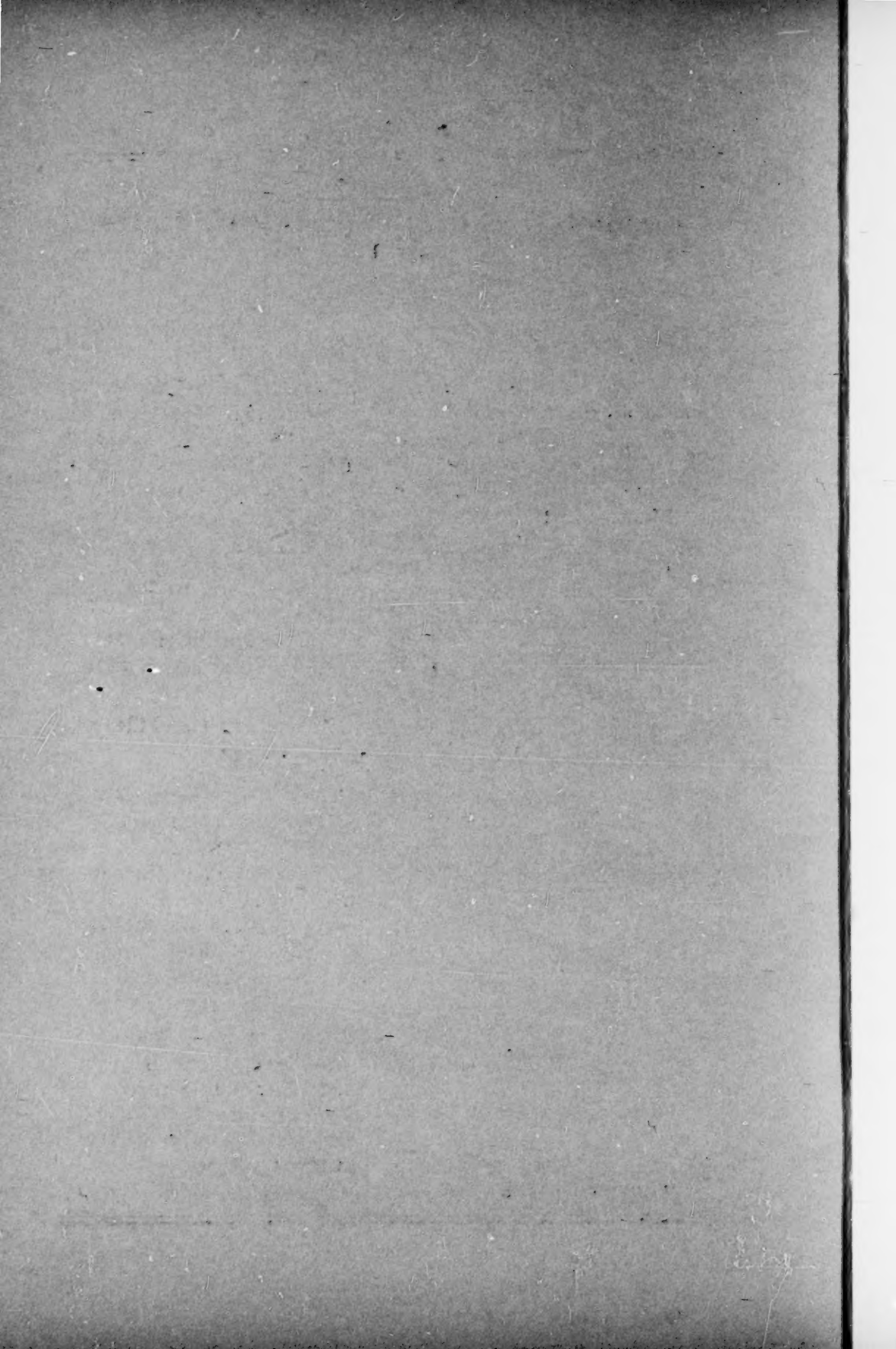
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**November 15, 1989**

13 pp



**QUESTION PRESENTED**

Whether the individual members of the Colorado State Board of Medical Examiners are entitled to absolute immunity from damages lawsuits brought under 42 U.S.C. §1983 arising out of their function as board members.

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## STATEMENT OF THE CASE

The Petitioner Lawrence M. Robertson, Jr., M.D. appealed to the Tenth Circuit Court of Appeals an Order of the United States District Court for the District of Colorado granting summary judgment in favor of Respondents Colorado State Board of Medical Examiners ("Board") and its individual members ("Board Members"). The grounds upon which summary judgment was granted are that the Board and Board Members are absolutely immune from damages lawsuits arising out of the function of the Board, that the Eleventh Amendment to the United States Constitution barred Petitioner's action brought in federal court against the Colorado State Board of Medical Examiners, and that Dr. Robertson's claim for an injunction was collaterally estopped by the Colorado Court of Appeals decision finding that the discipline ordered against Dr. Robertson was not arbitrary or capricious. *Colorado State Board of Medical Examiners v. Robertson*, 751 P.2d 648 (Colo.App. 1987).

The Tenth Circuit Court of Appeals affirmed the granting of summary judgment to the Respondents on the grounds that the individual Board Members were entitled to absolute immunity from suit. The Tenth Circuit relied on its earlier decision of *Horwitz v. The State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir. 1987), *cert. denied*, 484 U.S. 964, 108 S.Ct. 453, 98 L.Ed.2d 399 (1987) in which the court examined the functions of the Colorado State Board of Medical Examiners and determined that they were functionally comparable to prosecutorial or adjudicatory functions. *Horwitz, supra*, at 1515. The Tenth Circuit also held that the Eleventh Amendment to the United States Constitution barred Dr. Robertson's action brought in federal court against the Colorado State Board of Medical Examiners. The Tenth Circuit did not reach the issue of whether Dr. Robertson's claim for injunctive relief was collaterally estopped by the Colorado Court of Appeals decision in *Colorado State Board of Medical Examiners v. Robertson*, 751 P.2d 648 (Colo.App. 1987).



## STATEMENT OF THE FACTS

Dr. Robertson's claim under 42 U.S.C. §1983 arose from certain disciplinary actions taken against Dr. Robertson by the Colorado State Board of Medical Examiners. Dr. Robertson is a physician who practices neurosurgery in the Denver area.

A disciplinary procedure regarding a license to practice medicine in the State of Colorado was commenced against Dr. Robertson. On or about August 9, 1982, a Stipulation and Order was entered into between Robertson and the Colorado State Board of Medical Examiners whereby Dr. Robertson agreed to certain monitoring of his surgical practice.

In approximately May of 1984, information that Dr. Robertson was failing to comply with the terms of the Stipulation and Order came to the attention of the Board. Consequently, Dr. Robertson was served with a Summary Suspension of his license to practice medicine. Thereafter a hearing was held before an independent hearing officer of the State of Colorado on the issue of whether Dr. Robertson had failed to comply with the terms of the Stipulation. This was a full evidentiary hearing and Robertson was represented by counsel. The hearing officer rendered an Initial Decision on or about October 22, 1984. The Board issued its Final Decision and Order on March 8, 1985, recommending that Dr. Robertson's practice be monitored for an additional 24 months, setting out the conditions by which monitoring must occur, requiring the approval of the Board of any monitor, and requiring that Dr. Robertson notify the Board of any surgical procedure for an additional 36 months.

Dr. Robertson appealed the decision of the Board to the Colorado State Court of Appeals. The Colorado Court of Appeals rendered its decision on September 17, 1987, affirming the Order of the Board and specifically holding that the Board had the authority to impose greater sanctions than those recommended by the hearing officer; that the Board had



the authority to reject certain of the evidentiary findings of the hearing officer; and finally, that the Board did not act arbitrarily or capriciously, nor did the Board abuse its discretion in imposing the sanctions which were imposed upon Robertson. *Colorado State Board of Medical Examiners v. Robertson*, 751 P.2d 648 (Colo.App. 1987).

## **REASONS FOR NOT GRANTING THE PETITION**

### **I. It is a Well Settled Question of Law That the Eleventh Amendment to the United States Constitution Bars an Action Brought in Federal Court Against a State or its Agencies.**

It is well settled that "an unconsenting state is immune from suits brought in federal court by her own citizens as well as by citizens of another state." *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974) *reh'g den* 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed.2d 777 (1974). It is further well settled that the Eleventh Amendment bar against such actions applies to federal lawsuits alleging violations of 42 U.S.C. §1983. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 1144-47, 59 L.Ed.2d 358 (1979).

Dr. Robertson does not contest that by bringing the instant action against the Colorado State Board of Medical Examiners he was bringing the action against the State of Colorado. Thus, since the law is well settled that the Eleventh Amendment to the United States Constitution bars such a suit, the Petitioner's Petition for Writ of Certiorari should be denied.

### **II. The Petition for Writ of Certiorari Should Be Denied as the Colorado State Board of Medical Examiners and Its Individual Members, While Acting in Their Official Capacities, Are Not Persons Liable Under 42 U.S.C. §1983.**

This Court's recent decision in *Will v. Michigan Department of State Police*, \_\_\_\_ U.S. \_\_\_\_, 109 S.Ct. 2304, 105

L.Ed.2d 45 (1989) held that the individual states, their agencies and officials, while acting in their official capacities, are not persons liable under 42 U.S.C. §1983. Thus, since the sole basis of the Petitioner's action against the Colorado State Board of Medical Examiners and the individual Board Members is under 42 U.S.C. §1983, the Petitioner may no longer pursue such claim against the Board and the Board Members while acting in their official capacities and the Petition for Writ of Certiorari should be denied.

**III. It is Well Settled Law that Individual Board Members of a Regulatory Board, Such as the Colorado State Board of Medical Examiners, Performing Functions Analogous to Those of Judges and Prosecutors Are Entitled to Absolute Immunity From Suit.**

This Court in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) established the standard to determine whether administrative officials performing functions analogous to those of judges and prosecutors were entitled to absolute immunity. First, the officials' functions must be similar to those involved in the judicial process. Next, the officials' actions must be likely to result in damages lawsuits by disappointed parties. Finally, that there must be exhibited sufficient safeguards in the regulatory framework to control the unconstitutional conduct. *Butz*, 438 U.S. at 505-516.

Further, it is well established that it is the function of the board members in question that is relevant in determining whether absolute immunity should apply and not the particular acts taken while performing the prosecutorial or adjudicatory functions. See *Cleavinger v. Saxner*, 474 U.S. 193, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985).

The Tenth Circuit Court of Appeals in *Horwitz v. The State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir. 1987), *cert. denied*, 484 U.S. 964,

108 S.Ct. 453, 98 L.Ed.2d 394 (1987) applied the *Butz* standard to the functions of the Board Members of the Colorado State Board of Medical Examiners and concluded that:

. . . Under the *Butz* court rationale, the defendant Board members who performed statutory functions both adjudicatory and prosecutorial in nature, are entitled to absolute immunity from damages liability under 42 U.S.C. §1983. There exists a strong need to ensure that individual Board members perform their functions for the public good without harassment or intimidation. There exists adequate due process safeguards under Colorado law to protect against unconstitutional conduct without reliance upon private damages lawsuits. It is important to insulate the Board members from political influences in meeting their adjudicatory responsibilities in the adversarial setting involving licensure to practice medicine. Public policy requires that officials serving in such capacities be exempt from personal liability.

In the evaluation of the Board members' functions, we observe that they serve in the prosecutorial role and that they, among other things, initiate complaints, start hearings, make investigations, take evidence, and issue subpoenas. They also serve in the adjudicative role as judges. Thus, the Board duties are "functionally comparable" to a court of law. And we are reminded that, with respect to immunity, we must include all acts of the officials performing statutory duties as having "more or less connection with the general matters committed by law" to his station. [Citations omitted]

*Horwitz, supra*, at 1515-1516.

Thus, the standard for determining whether individual board members of a regulatory body such as the Colorado State Board of Medical Examiners are entitled to absolute immunity is well established. The Tenth Circuit Court of Appeals in *Horwitz, supra*, properly applied such standard

and determined that the individual members of the Colorado State Board of Medical Examiners were entitled to absolute immunity since the functions alleged in *Horwitz* were of a prosecutorial and adjudicatory nature.

The Tenth Circuit Court of Appeals in the instant matter did not hold that the Colorado State Board of Medical Examiners was entitled to absolute immunity with regard to all of its actions. Rather the Tenth Circuit compared the functions performed by the Board Members in the instant case with the functions performed by the Board members in the *Horwitz* case and found that, just as in *Horwitz*, the Board Members of the Colorado State Board of Medical Examiners were acting in their prosecutorial and adjudicatory functions and therefore were entitled to absolute immunity.

**IV. The Petitioner Has Failed to Establish That There is a Significant Split of Authority Amongst the Circuits with Regard to the Determination of When Board Members Such as the Board Members of the Colorado State Board of Medical Examiners Are Entitled to Absolute Immunity.**

The Petitioner cites this Court to four cases from four different circuits for the proposition that a conflict exists between the circuits as to the issue of granting absolute immunity for prosecutorial and judicatory functions of members of a board such as the Colorado State Board of Medical Examiners. An examination of those cases shows that Petitioner's assertion is incorrect.

The first case cited to this Court by the Petitioner is *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984). That case, however, did not deal with the question of granting absolute immunity for quasi-judicial functions but, rather, the granting of immunity for legislative functions and thus does not establish a divergence of opinion amongst the circuits.

The remaining three cases cited by Petitioner to this Court are *Manion v. Michigan Board of Medicine*, 765 F.2d

590 (6th Cir. 1985), dealing with a Board of Medical Examiners, *Saxner v. Benson*, 727 F.2d 669 (7th Cir. 1984) *aff'd* 474 U.S. 193, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985) dealing with an in-prison disciplinary board, and *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982) dealing with a judicial selection committee. Each of those cases applied the *Butz v. Economou* analysis and examined the functions of the particular boards in question to determine whether they were functionally comparable to the capacities of judges, prosecutors and jurors, whether there was a need to assure that such board members could perform their functions without harassment or intimidation, whether there were safeguards to reduce the need for private damages actions as a means of controlling unconstitutional conduct, whether there was a need to insulate the board members' activities from political influence, the importance of precedent, the adversary nature of the process, and the correctability of error on appeal.

To the extent the functions of various boards differ, the circuits will reach differing conclusions as to the entitlement to absolute immunity. However, since the circuits are consistently engaging in the proper analysis under *Butz v. Economou*, no split or divergence of opinion exists.

**V. This Court Should Decline to Grant Petitioner's Petition for Writ of Certiorari as Petitioner is Barred by the Doctrine of Collateral Estoppel From Claiming that the Colorado State Board of Medical Examiners' Actions Were Arbitrary or Capricious.**

It is well settled law that the doctrine of collateral estoppel prevents relitigation of an issue when the issue is identical to an issue that was actually and necessarily decided at a prior proceeding; there was a final judgment on the merits at the prior proceeding; there was identity of the parties or privity between the parties against whom the doctrine of collateral estoppel is asserted; and the party against whom the doctrine of collateral estoppel is asserted had a full and thorough opportunity to litigate the issue in the prior proceedings. *In re*

*the Matter of Lombard*, 739 F.2d 499, 502 (10th Cir. 1984); *People ex rel. Gallagher v. District Court*, 666 P.2d 550, 554 (Colo. 1983); *People v. Hearty*, 644 P.2d 302 (Colo. 1982).

The issues presented by Petitioner in his Complaint in the instant action are identical to those brought by Petitioner on his appeal of the State Board of Medical Examiners' decision to the Colorado Court of Appeals. *See Colorado State Board of Medical Examiners v. Robertson*, 751 P.2d 648 (Colo.App. 1987). There was an identity of parties, Petitioner had a full and fair opportunity to litigate the issues on his appeal to the Colorado Court of Appeals and a final judgment resulted. The Colorado Court of Appeals ruled that the Board and its Board Members had the authority to review the decision of the hearing officer, had the authority to reject certain findings of the hearing officer and impose sanctions greater than those recommended by the hearing officer and that the Board and Board Members did not act arbitrarily or capriciously. Since those issues were finally decided by the Colorado Court of Appeals, the Petitioner's claim to have the Colorado State Board of Medical Examiners' decision set aside as arbitrary and capricious under 5 U.S.C. §706(2)(A)(B)(C)(D) is barred by the doctrine of collateral estoppel. Notwithstanding the collateral estoppel issue, 5 U.S.C. §706(2) is not applicable to the decision of the Colorado State Board of Medical Examiners as the Board is not a federal agency subject to that statute. *See* 5 U.S.C. §701(b).



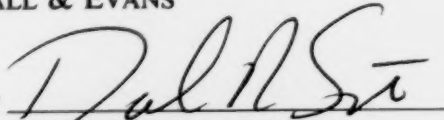
## CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were placed in the United States mail with proper postage, addressed to William E. Myrick, 1045 Lincoln Street, Suite 200, Denver, Colorado 80203, Attorney for Petitioner, on this 14th day of November, 1989.

